No. 87-1361

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RALPH DIAMOND, BENJAMIN F. NOLAN, SAMUEL GREENSTEIN, BARBARA KAISER and BENJAMIN GLASS, individually and on behalf of all others similarly situated,

Appellants,

vs.

MARIO CUOMO, Governor of the State of New York, EDWARD V. REGAN, State Comptroller, NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM, POLICEMEN'S AND FIREMAN'S RETIREMENT SYSTEM, ALBERT M. ROSENBLATT, as Chief Administrative Judge of New York State Office of Court Administration, THE NEW YORK STATE OFFICE OF COURT ADMINISTRATION, NEW YORK CITY BOARD OF ELECTIONS, WESTCHESTER COUNTY BOARD OF ELECTIONS,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Question Presented

Whether Article 6, Section 25(b) of the New York Constitution and Section 23 of the New York Judiciary Law, as partially pre-empted by the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, violate the equal protection clause of the Fourteenth Amendment by requiring that elected judges, but not appointed judges, retire at age seventy?

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Appellants,

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MARIO CUOMO, Governor of the State of New York, EDWARD V. REGAN, State Comptroller, NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM, POLICEMEN'S AND FIREMAN'S RETIREMENT SYSTEM, ALBERT M. ROSENBLATT, as Chief Administrative Judge of New York State Office of Court Administration, THE NEW YORK STATE OFFICE OF COURT ADMINISTRATION, NEW YORK CITY BOARD OF ELECTIONS, WESTCHESTER COUNTY BOARD OF ELECTIONS,

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellees Mario Cuomo, Governor of the State of New York, Edward V. Regan, Comptroller of the State of New York, and the New York State Employees' Retirement System, Policemen's and Firemen's Retirement System ("appellees") move the Court

to dismiss this appeal or, in the alternative, to affirm the judgment of the New York Court of Appeals on the ground that it is manifest that the questions raised in the jurisdictional statement are so insubstantial as not to need further argument.

STATEMENT

A. *The Laws Involved*

Appellants challenge the validity of the distinction between elected and appointed judges that arises in New York State from the partially pre-emptive effect of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* (1982 and Supp. 1987), upon New York's mandatory judicial retirement provisions, N.Y. Const., Art. VI, § 25(b); N.Y. Jud. Law § 23 (McKinney 1983). The New York provisions mandate that judges retire at age seventy. Because the ADEA bars discrimination in employment on the basis of age, the New York retirement provisions are pre-empted as to positions that are covered by the Act. Elected officials, however, such as appellant judges, are not protected by the ADEA. 29 U.S.C. § 630(f) (1985). New York's Administrative Board of the Courts[1] therefore has construed the interplay between these state and federal laws to require that elected judges retire at age seventy, but to permit appointed judges to sit after reaching that age. Memorandum of Hon. Albert M. Rosenblatt dated May 26, 1987. Appendix to Motion to Dismiss or Affirm at A-1. (R. 125).[2] The Appellate Division of the New York Supreme Court and the New York Court of Appeals both sustained the Board's construction and rejected appellant's equal protection challenge to the different treatment accorded appointed and elected judges.[3]

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[1] The Administrative Board of the Courts consists of the Chief Judge of the New York Court of Appeals and the Presiding Justices of the four Appellate Divisions of the Supreme Court. N.Y. Jud. Law § 210(2) (McKinney 1983).

[2] Citations in the form of "R.____" are references to the record below.

[3] Most judges in New York are elected. Aside from a minority of local judges, the only New York judges who are appointed are Judges of the Court of Appeals, N.Y. Const. Art. 6, § 2(c-f) (McKinney 1987), Court of Claims judges, Art. 6, § 9, and Family Court and Criminal Court judges in New York

(Footnote continued)

Until the ADEA was amended, effective January 1, 1987, 29 U.S.C. §§ 623(a) and 631(a) barred employment discrimination on the basis of age against individuals between the ages of forty and seventy. Pub. L. No. 90-202, as amended by Pub. L. 95-256, § 3(a). Before 1987, therefore, there was no conflict between the ADEA and the New York provisions requiring that judges retire at age seventy. The recent amendment to 29 U.S.C. § 631(a), however, removed the upper age limit from the prohibition against age discrimination, Pub. L. No. 99-272 § 9201(d)(2), thereby creating a conflict between the federal and state laws. But the definition of employee in the act specifically exempts from its scope:

> any person *elected* to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

29 U.S.C. § 630(f) (emphasis added). This definition of "employee" was added to the ADEA in 1974, when the Act was amended to apply to state and local governments. Pub. L. No. 93-259, § 28(a)(1)-(4).

The exemption for elected officials and their personal advisors and policymaking appointees contained in 29 U.S.C. § 630(f) was intended to be narrowly construed. 118 Cong. Rec. at 4492, 1972 U.S. Code Cong. and Adm. News p. 2180 (Joint Explanatory Statement of Managers at the Conference on H.R. 1746 to Further Promote Equal Employment Opportunities For American

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City, Art. 6 §§ 13(a), 15(a). The remaining judges are elected: Justices of the Supreme Court (the state court of general jurisdiction), including those designated to sit on that court's Appellate Division, Art. 6, § 6; Judges of the Surrogate's Court, Art. 6, § 12(b); Family Court judges who serve outside of New York City, Art. 6, § 13(a); Judges of the Civil Court of New York City, Art 6, § 15(a); County Court judges, Art. 6 § 10(a); and Judges of the District Court, Art. 6, § 16(h). *See also* Art. 6 § 17. As stated by the Appellate Division (17a), only 18% of New York's judges are appointed.

Workers (R. 178);[4] *Anderson v. City of Albuquerque*, 690 F.2d 796 (10th Cir. 1982); EEOC Dec. 78-42 Empl. Prac. Dec. (CCH) ¶ 6725 (Sept. 29, 1978); EEOC Dec. 79-08 Empl. Prac. Dec. (CCH) ¶ 6739 (Oct. 29, 1978). Thus, as the EEOC itself has determined, appointed judges, unlike elected judges, are protected by the ADEA and may not be involuntarily retired at age seventy. Formal EEOC Opinion to Representative Claude Pepper (April 7, 1987). As the EEOC stated, a narrow construction of the ADEA's exemption does not permit an appointed judge to be considered as a "person chosen by such [elected] officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office", 29 U.S.C. § 630(f). *Accord*, *Schlitz v. Virginia*, No. 87-0753-R (E.D. Va. March 14, 1988) (available on Westlaw; to be reported at 681 F.Supp. 330); 71 Op. Md. Att'y. Gen. 68 (1986); 87-5 S.C. Op. A.G. 23 (Jan. 21, 1987). Appellants do not challenge this statutory construction.[5]

Thus, the distinction between elected and appointed judges exists solely by operation of federal law. To the extent that the New York Constitution and Judiciary Law mandate that appointed judges retire at age seventy, they conflict with the ADEA

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[4] "[T]he legislative history behind the [1974] amendment to the ADEA is virtually nonexistent". *E.E.O.C. v. County of Calumet*, 686 F.2d 1249, 1252 (7th Cir. 1982). However, the language in 29 U.S.C. § 630(f) is identical to that contained in Title VII of the Civil Rights Act of 1964, as amended in 1972. 42 U.S.C. § 2000e(f); Pub. L. No. 92-261, § 2(5). The legislative history of the 1972 amendment, cited above and *infra* at 11-12, is thus appropriately considered here. *EEOC v. Board of Trustees*, 723 F.2d 509 (6th Cir. 1983); *see Lorillard v. Pons*, 434 U.S. 575, 584 (1978).

[5] *Cf. EEOC v. Massachusetts*, No. 87-3015-K (D. Mass. Feb. 23, 1988) (available on Westlaw; to be reported at 680 F. Supp. 455) (although not expressly exempted from ADEA, appointed judges are exempt because coverage would be incompatible with objectives of Act); *Apkin v. Treasurer*, 401 Mass. 427, 517 N.E.2d 141 (1988) (in absence of express congressional statement that they are covered by ADEA, appointed judges are exempt). In contrast to *EEOC v. Massachusetts* and *Apkin v. Treasurer*, none of the parties to this appeal have claimed that appointed judges are exempt from the ADEA. See Appendix to Jurisdictional Statement at 26a.

as amended, and their application is pre-empted by the overriding federal law. *See EEOC v. Wyoming*, 460 U.S. 226 (1983). As to elected judges, however, there is no conflict, and New York law therefore still compels elected judges to retire at age seventy.

B. *Proceedings Below*

This action was commenced in July, 1987 by five elected judges. Two of the plaintiffs, Judge Nolan, Judge of the New York City Civil Court, Bronx County, and Judge Kaiser, Judge of the Family Court, Westchester County, are age seventy and seventy-one, respectively, and were compelled to retire on December 31, 1987, by virtue of the provisions challenged herein. (Cplt. ¶¶ 18-19, 22-23; R. 49-42.)[6] A third plaintiff, Justice Glass, Justice of the Supreme Court, Queens County, is age seventy-six. Pursuant to Judiciary Law § 115, Justice Glass was certificated three times for continued service beyond age seventy. See *infra* at 8 n.11. He, too, was compelled to retire on December 31, 1987, when his final, two-year certification expired. (Cplt. ¶¶ 24-26; R. 42.) The remaining plaintiffs, Judge Greenstein, Judge of the Civil Court, Kings County, and Judge Diamond, Judge of the Family Court, Nassau County, are age sixty-five and sixty-nine, respectively. Each will be compelled to retire on the last day of the year in which he reaches age seventy, prior to the completion of his elective term of office. (Cplt. ¶¶ 14-17, 20-21; R. 40-42).

In a memorandum decision dated September 3, 1987, the Supreme Court, Kings County, ruled that the challenged distinction has no rational basis and, therefore, violates the United States Constitution[7] (59a).[8] The Appellate Division reversed by

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[6] Citations in the form of "Cplt. ¶ __ " are references to appellants' complaint.

[7] Although plaintiffs moved only for preliminary injunctive relief, after the lower Court issued its decision, the parties consented to entry of an order and judgment awarding declaratory relief. (R. 9). In the Appellate Division, plaintiffs made clear that they no longer sought injunctive relief and the parties stipulated to the entry of a final judgment by the Supreme Court. (22a, n.3).

[8] Citations in the form of "__ a", are references tko the Appendix to the Jurisdictional Statement.

a four to one vote. (8a, 12a). In a *per curiam* opinion joined by four justices, the Court rejected the "argument that New York must entirely set aside its historical rule requiring certain judges to retire at 70 solely because, under the purported command of Federal legislation, a relatively small percentage of such judges (approximately 18%) have been exempted from the scope of that rule". (17-a).[9] The court stated that although the classification challenged by plaintiffs was one created by the federal age discrimination act rather than by New York law, plaintiffs had not placed the federal law in issue. Accordingly, the Court ruled that the validity of the federal statute was not before the Court. (23a).[10]

In any event, the Court stated, the disparity created by the federal statute – that states are free to impose age restrictions upon elected officials but may not compel appointed officials or employees to retire at a certain age – is entirely rational. (24a-28a). Congress could well have determined, the Court ruled, that it is elected rather than appointed officials who generally formulate important state policies and make important state decisions. (27a). Accordingly, the court concluded, it was rational for Congress, acting pursuant to established principles of comity, to permit the states to establish age qualifications for elected offices (whether executive, legislative or judicial), but to bar age discrimination as to other positions. (27a-28a). Acknowledging the possibility that the general approach taken by Congress may have been ill-suited to particular offices in certain states (referring specifically to New York State's methods of selecting judges), the Court nevertheless recognized the rationality of Congress' line-drawing. (28a). "The line drawn by

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[9] Article 6, § 25(b) of the State Constitution, which took effect September 1, 1962, continues in effect a constitutionally mandated judicial retirement age that for at least certain State court judges has appeared in every State Constitution since the first New York Constitution of 1777. That Constitution provided, in Article XXVI, that the judges of the State Supreme Court and the first judge of every county court had to relinquish office at age sixty.

[10] Appellants still do not challenge the validity of the elected/appointed classification created by the ADEA. (J.S. at 16).

the Congress may be imperfect without being unconstitutional". (30a-31a; citations omitted).

The majority rejected the notion advanced by appellants that because certain elected judges in New York perform similar or identical functions as certain appointed judges, the less favorable treatment afforded elected judges is unconstitutional. "[T]his analysis fails to explain why the federally-created distinction between elected and appointed officers should be held unconstitutional as applied to *all* elected judges. . . ." (35a). Furthermore, the Court stated, even as to elected judges able to identify "similarly situated" appointed judges, the disparate treatment is not the product of invidious discrimination, but of "the historical and political circumstance in New York that, in certain cases, some judges of certain courts are elected, while other judge of the same court are appointed". (36a) That circumstance, the Court ruled, "does not furnish a basis upon which to condemn certain distinctions that are in fact rationally based, which are found elsewhere in New York or Federal Law". (37a). The Court thus reversed the order and judgment of the court below and declared that the challenged provisions do not violate the plaintiffs' rights under the due process and equal protection clauses of the Fourteenth Amendment. One Justice concurred in part and dissented in part. (39a). He agreed with the majority that the challenged state provisions are constitutional and should not have been declared unconstitutional by the lower court. (55a). Nevertheless, he would have ruled that "the application of the ADEA, as interpreted by the New York State Administrative Board of the Courts . . . to exclude from the ADEA's protection elected judges in New York State", has no rational basis and deprives elected judges of equal protection of the laws. (41a).

The New York Court of Appeals affirmed unanimously in a *per curiam* opinion. (1a). The Court first rejected appellants' due process claims, relying upon its holding in *Maresca v. Cuomo*, 64 N.Y.2d 242, 485 N.Y.S.2d 724, 475 N.E.2d 95 (1984), *appeal dismissed for want of a substantial federal question*, 474 U.S. 802 (1987), that mandatory retirement was a rational state policy. (4a). The court also rejected the argument that age was

a suspect classification warranting strict scrutiny review of appellants' equal protection challenge. (*Id.*) The court then ruled that the mere fact that a federal law precluded full implementation of a rational state policy did not compel the state to abandon the policy in its entirety:

> That the State policy requiring retirement of Judges is partially frustrated because the federal statute preempts it with respect to appointed Judges does not render the policy irrational and the State is free to pursue that policy to the extent doing so is consistent with federal law. While certain anomalies appear as the result of the unrelated provisions of the federal statute and the State provisions, such anomalies in judicial classifications are not unusual given the diversity of the State and its population, and have been upheld (*see, e.g., Cass v. State of New York*, 58 NY2d 460).

(5a).[11]

ARGUMENT

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL CONSTITUTION QUESTION.

As the Court of Appeals and Appellate Division held, the distinction between elected and appointed judges that is challenged here is not traceable to New York executive, legislative or judicial action, or to its constitution, but is solely a result of the partially pre-emptive application of the ADEA to pre-existing state law. Because New York has not purposefully discriminated against elected judges, appellants' rights under the equal protection clause have not been violated. Furthermore, as appellants themselves concede, the ADEA does not itself

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[11] The Administrative Board of Courts had also determined that Supreme Court Justices who, upon reaching age seventy, have been "certificated" for (up to three) additional two year terms under N.Y. Judiciary Law § 115 (McKinney 1983), are subject to mandatory retirement because they hold office by reason of their initial election to the Supreme Court. (A-2). The Court of Appeals also upheld the Board's determination in this respect. (6a).

violate the equal protection clause. The appeal thus presents no substantial constitutional question.[12]

As this Court has held, governmental action is violative of the equal protection clause only if the government has purposefully discriminated against a class of individuals. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979) ("purposeful discrimination is the 'condition' that offends the Constitution") (*citing Swan v. Charlotte- Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971)); *Washington v. Davis*, 426 U.S. 22 (1976). As the court below held in another case, an equal protection violation requires a showing not simply of "an unequal hand" but of "an evil eye", *i.e.*, of "conscious discrimination." *Matter of 303 West 42nd Street Corp. v. Klein*, 46 N.Y.2d 686, 693-694 (1979).

Here, New York State has not created two classes for purposes of mandatory retirement, much less purposefully discriminated against one of them. New York State has historically required judges — elected and appointed alike — to retire at age seventy. In ruling that appointed judges no longer must retire at the age of seventy, the Administrative Board of Judges has simply

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[12] Appellants appear also to contend that Congress' "decision to eliminate all age discrimination in employment" justifies raising the level of equal protection review to one of "strict scrutiny", or "quasi-strict" scrutiny, and that under a heightened standard, mandatory retirement provisions violate the equal protection clause. J.S. at 37-39. The contention is meritless. First, as the provision exempting elected officials illustrates, Congress has not eliminated all age discrimination in employment. 29 U.S.C. 630(f); *see also* 29 U.S.C. §§ 623(f)(1); 631(c)(1), 631(d) (Supp. 1987); *Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353, 356 nn.1, 2 (1985). Second, and more fundamentally, if the enhancement of statutory protection afforded a particular class were to have any impact on the standard used in determining an equal protection challenge, it would be to relax the standard of review. *See San Antonio School District v. Rodriguez*, 411 U.S. 1, 19 (1973); *United States v. Carolene Products*, 304 U.S. 144, 151-152 n.4 (1938). This court's decisions analyzing and upholding mandatory retirement laws under a rational basis standard are still good law. *Vance v. Bradley*, 440 U.S. 93 (1979); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976); *see Maresca v. Cuomo*, 474 U.S. 802 (1985), *dismissing appeal from* 64 N.Y.2d 242 (1985).

acknowledged the partially pre-emptive effect of a federal law on New York's mandatory retirement statute. That acknowledgement hardly constitutes purposeful discrimination by New York State.

In any event, it would be entirely rational for New York purposefully to continue to apply its constitutionally based mandatory retirement policy, adopted by the will of the people, insofar as our federal structure permits it. Pre-emption doctrine, a product of the Supremacy Clause, U.S. Const. Art. VI, cl.2, does not permit a state to apply its law to the extent that it comes into conflict with federal law. *R.J. Reynolds Tobacco Co. v. Durham County*, ___ U.S. ___, 107 S. Ct. 499, 507 (1986); *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 368 (1986). Insofar as state law does not interfere with federal law, however, states are free to implement their preferred policies, assuming of course that they are otherwise valid. New York's mandatory retirement provisions have been expressly declared to be valid. *Maresca v. Cuomo*, 64 N.Y.2d 242, 485 N.Y.S.2d 724, 475 N.E.2d 95 (1984), *appeal dismissed for want of a substantial federal question*, 474 U.S. 802, 106 S. Ct. 34 (1987). Accordingly, as the Court of Appeals held, it is hardly irrational for New York to continue enforcing, with respect to elected judges, its long-standing constitutional requirement of mandatory retirement at age 70. Put somewhat differently, the rational basis for the differing treatment accorded New York's Judges is that as a consequence of the ADEA and the Supremacy Clause, federal law bars New York from requiring its appointed judges to retire at age seventy; whereas, as a consequence of the ADEA's exemption of elected officials, federal law permits New York to require elected judges to retire at that age.

Furthermore, although the issue is not presented here, even if New York had itself passed a law subjecting only elected judges to mandatory retirement, that choice would not be irrational and thus would pass constitutional muster. Most appointed judges in New York are appointed by a Mayor or the Governor following input from a nominating commission or screening committee that scrutinizes a candidate's recent legal or judicial

achievements.[13] It would not be irrational for a legislature to conclude that an appointing Mayor or Governor is in a better position than the electorate to make an individualized assessment of whether a candidate is likely to perform at a high level of competence throughout his or her projected term. Accordingly, there would be nothing irrational about a decision to adopt a system that deems mandatory retirement of appointed judges unnecessary, but requires such retirement, as a prophylactic measure, for judges who face election.

Moreover, as appellants themselves concede (J.S. at 16), and as the Appellate Division expressly stated (23a *et seq.*), it was not impermissible for Congress, in enacting the ADEA, to treat elected state officials differently from appointed state officials.[14] *Cf. Johnson v. Mayor and City Council of Baltimore*, 472 U.S. 353, 105 S.Ct. 2717, 2724 n.10 (Congress may exempt federal employees from ADEA differently than it exempts other employees). The legislative history of the ADEA demonstrates that elected officials were exempted from the Act in order to preserve the states' control over their electoral processes, which, as the Appellate Division stated, generally leads to the selection of a state's most important officials. Senator Ervin, cosponsor of the Title VII analogue to section 630(f) (R. 189), *see supra* at 2-3 n.3, stated that the bill was intended to preserve for the States "the power of a state to select its own officers and employees," 118 Cong. Rec. at 4483 (1972), and to ensure that the State's selection of its elected officials and employees would not be subject to "the control of the Federal Government". *Id.*

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[13] *See, e.g.*, N.Y. Const. Art. 6 § 2(c-f) (establishing Commission on Judicial Nomination for Court of Appeals vacancies); Executive Order No. 9, 9(A) NYCRR § 4.9 (1983) (establishing Judicial Screening Committees for appointment of Court of Claims Judges, designation of Appellate Division Justices, and filling of Supreme Court, Surrogate's Court, County Court and Family Court vacancies); *Fam. Ct. Act* § 124 (McKinney 1983) and Practice Commentary (describing Mayor's Committee on the Judiciary).

[14] The exemption exists not only in the ADEA, 29 U.S.C. § 630(f), but also in Title VII, 42 U.S.C. § 2000e(f) (1982) and in the Fair Labor Standards Act, 29 U.S.C. § 203(e) (1982).

Similarly, Senator Williams stated that the election of officials at the state and local government level should not be subject to "a law of this nature". *Id.* at 4492 (R. 198). Given Congress' concern that the federal government should not interfere with state elections — an unquestionably legitimate concern — it was entirely rational for Congress to permit states to establish age qualifications for its candidates for elective office, but to impose a broad ban against age discrimination with respect to virtually all other governmental positions. *See Schlitz v. Virginia*, No. 87-0753-R (E.D. Va. March 14, 1988) (available on Westlaw; to be reported at 681 F. Supp. 330) (coverage of elected officials was apparently deemed not necessary "perhaps due to confidence that the electorate will not discriminate based on age").

The exemption of elected officials was also prompted by a concern that absent the exemption, a losing candidate who believed he had lost an election because of his race, sex or national origin (and later age) might seek an order from the Equal Employment Opportunity Commission vitiating the election. 118 Cong. Rec. at 7567 (1972) (remarks of Rep. Erlenborn); see 118 Cong. Rec. at 4096-4097 (1972) (remarks of Senators Ervin, Williams and Javits). That concern obviously did not apply to appointed officials.

Finally, as the courts below ruled, the ADEA is not irrational simply because its application to New York's scheme for selecting judges may not further Congress' purpose of permitting states to establish qualifications for their most important governmental positions. "When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979); *accord, New York City Transit Authority v. Beazar*, 440 U.S. 568, 593 (1979); *Mathews v. Diaz*, 426 U.S. 67, 83-84 (1976). "The calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. at 272.[9]

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[9] None of the parties have contended that the ADEA, by barring New York from requiring appointed judges to retire at age 70, impermissibly interferes

(Footnote continued)

CONCLUSION

As appellants have failed to raise a substantial federal question, this Court should dismiss the appeal, or alternatively, affirm the order of the New York Court of Appeals. If this Court treats the jurisdictional statement as a petition for certiorari, the petition should be denied.

Dated: New York, New York
May 6, 1988

Respectfully submitted,

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with New York's sovereignty. (26a). If this Court were to find the distinction created by the ADEA irrational, the question would arise as to whether an extension of the ADEA to cover elected judges would interfere with New York's sovereignty in violation of the Tenth Amendment. *See South Carolina v. Baker*, 56 U.S.L.W. 4311, 4314 (U.S. Apr. 19, 1988); *id.* at 4318 (Scalia, J., concurring); *id.* at 4318 (Rehnquist, J., concurring); *id.* at 4318 (O'Connor, J., dissenting); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985); *Coyle v. Oklahoma*, 221 U.S. 559 (1911). *Cf. EEOC v. Wyoming*, 460 U.S. 226 (1983) (general extension of ADEA to cover employees of state and local governments does not violate tenth amendment.)

APPENDIX

Memorandum of Albert M. Rosenblatt
dated May 26, 1987

STATE OF NEW YORK
UNIFIED COURT SYSTEM
(OFFICE OF COURT ADMINISTRATION)
270 BROADWAY
NEW YORK, NEW YORK 10007
(212) 587-2010

ALBERT M. ROSENBLATT
Chief Administrative Judge

MICHAEL COLODNER
Counsel

May 26, 1987

TO: Judges and Justices of the Unified Court System

FM: Albert M. Rosenblatt

RE: Effect of the Federal Age Discrimination in Employment Acton mandatory retirement of judges

This memorandum alerts all judges and justices of the Unified Court System to a recent change in the Federal Age Discrimination in Employment Act (ADEA) that may have an effect on the provisions in New York law governing mandatory retirement of judges at age 70.

The ADEA (29 U.S.C. §§ 621-634) prohibits an employer from discriminating against an individual on the basis of age. 29 U.S.C. § 623(a). It applies to state and local governments as "employers", but does not apply to "any person elected to public office in any State or political subdivision of any State by the qualified votes thereof". 29 U.S.C. § 630(f). It thus protects those judges appointed to judicial office, but not those elected to judicial office.

The class of nonelected individuals protected by the ADEA used to encompass those between the ages of 40 and 70. 29 U.S.C.

§ 631(a). Effective January 1, 1987, this class has been expanded by new legislation to remove the maximum age of 70, thereby protecting from mandatory retirement all individuals within the coverage of the Act over the age of 40.

The Legislature's removal of the maximum age in the ADEA places the ADEA in conflict with the provisions of the New York State Constitution and statutes that require that certain appointed judges retire at the end of the year in which they reach 70. N.Y. Const., Art. VI, § 25(b); Judiciary Law, § 23. To the extent that the ADEA provisions conflict with state mandatory retirement provisions, the ADEA has been held to prevail.

It is the opinion of the Administrative Board of the Courts (which consists of Chief Judge Sol Wachtler, and Presiding Justices Francis T. Murphy, Milton Mollen, A. Franklin Mahoney and Michael F. Dillon), that those judges who are appointed to judicial office – judges of the Court of Appeals, Court of Claims, New York City Family Court and New York City Criminal Court – may remain in office after the age of 70 until the completion of their terms notwithstanding the state constitutional proscription to the contrary. While the ADEA lists three categories of exemptions to its protections – "appointees of elected officials", "bona fide executives" and "high policymakers", it is the Board's opinion that New York's appointed judges do not fall within those categories, nor do appointed judges who also exercise administrative authority fall within those categories.

With respect to certificated Supreme Court justices, it is the conclusion of the Administrative Board that certificated Supreme Court justices are elected judges for purposes of the ADEA and so are not covered by the protections of that Act. Consequently, the ADEA will not affect the existing certification process set forth by law, including the termination of service of certificated judges at the age of 76. N.Y. Const., Art. VI, § 25(b); Judiciary Law, § 115.

If you have any questions concerning the application of this recent amendment to the ADEA, please contact Michael Colodner, Counsel to the Office of Court Administration, 270 Broadway, New York, New York 10007, (212) 587-2010.